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Clerk/Deputy Clerk

5/7/09

Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0367 and 2008-0368, Petition of Darlene Frappiea; Petition of Pamela Blake, the court on April 17, 2009, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is not necessary for the disposition of these consolidated appeals. We affirm.

In these consolidated appeals, the petitioners, Pamela Blake and Darlene Frappiea, challenge decisions of the New Hampshire Personnel Appeals Board (PAB) concluding that it lacked subject matter jurisdiction to consider their appeals. The following undisputed facts are derived from the record. Blake was terminated from her part-time position as a counter clerk at the New Hampshire Department of Safety (DOS). She appealed to the PAB, claiming that the termination violated several statutes and administrative personnel rules, and that the DOS had retaliated against her for informing a co-employee of her rights under a collective bargaining agreement and for her former union activities. The DOS filed a motion to dismiss, arguing that the PAB lacked subject matter jurisdiction to consider the appeal. The PAB granted the motion, determining that the administrative discipline rules relied upon by Blake did not apply to part-time employees and, thus, it lacked jurisdiction to consider her appeal. It subsequently denied her motion for reconsideration, and she filed a petition for writ of certiorari.

Frappiea was laid off from her part-time position as a certifying officer at the New Hampshire Department of Employment Security (DES). She appealed to the PAB, claiming that the termination violated provisions of the administrative rules, the collective bargaining agreement and certain statutes. She also claimed that her termination constituted unlawful retaliation for her union-related activities. The DES filed a motion to dismiss, arguing that the PAB lacked subject matter jurisdiction to consider the appeal. The PAB granted the motion, determining that because Frappiea had failed to state which personnel rule affecting part-time employees was allegedly violated or improperly applied, it lacked jurisdiction to consider her appeal. It denied her motion for reconsideration, and she filed a petition for writ of certiorari. We consolidated the petitions.

The petitioners argue that the PAB has jurisdiction to hear their appeals because it has general authority to hear and decide "appeals of decisions arising out of application of the rules adopted by the director of personnel"

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under RSA 21-I:46, I (2000). Therefore, we must determine whether the petitioners raise claims in their pleadings before the PAB that are grounded upon alleged violations or misapplications of the personnel rules. See Appeal of Higgins-Brodersen, 133 N.H. 576, 581 (1990)(holding that the PAB lacked jurisdiction under RSA 21-I:46 to hear appeals grounded upon alleged statutory violation). Because the legislature has not provided for a statutory right to appeal PAB decisions to this court under the general authority of RSA 21-I:46, a petition for writ of certiorari is the proper remedy. See *id.* at 580-81; cf. Appeal of Morton, 158 N.H. 76, 78 (2008)(review of PAB decision governed by RSA 541:13). Accordingly, we confine our review of the PAB's dismissal of the petitioners' appeals to determine whether it "acted illegally with respect to jurisdiction, authority or observance of the law, thereby arriving at a conclusion which could not be legally or reasonably made or acted arbitrarily, capriciously or with an unsustainable exercise of discretion." Petition of Bennett, 151 N.H. 130, 133 (2004); see Higgins-Brodersen, 133 N.H. at 581.

First, both petitioners argue that the PAB had jurisdiction to hear their appeals because they each alleged that they were terminated for discriminatory, "non-merit" reasons in violation of New Hampshire Administrative Rules, Part Per 101 (Part 101). Part 101, which is the "purpose and scope" section for the personnel rules, articulates the purpose and goals that the employment rights and standards are designed to achieve. See, e.g., NH Admin Rules, Per 101.01 (effective April 1998). By providing concrete objectives, the "purpose and scope" provision serves to inform the meaning of the substantive rules that are adopted to accomplish the stated purpose. See, e.g., NH Admin Rules, Per 1101.02 (effective October 2006) (layoff rules require specific procedures be followed when separating an individual from employment). It does not operate as a stand alone provision that vests particular substantive rights, the violation for which would serve as an independent avenue for an affected employee to seek relief. Therefore, we conclude that Part 101 cannot serve as an independent basis to confer jurisdiction upon the PAB. Accordingly, we reject the petitioners' argument that the PAB has jurisdiction under RSA 21-I:46 to hear appeals solely based upon an alleged violation of Part 101.

The petitioners cite New Hampshire Administrative Rules, Per 101.02(b) to support their argument that Part 101 is substantive. This rule provides: "In the case of terms and conditions of employment which are negotiated, the provisions of the collective bargaining agreements shall control." NH Admin Rules, Per 101.02(b). The petitioners, however, fail to provide any developed argument explaining the alleged substantive import of this rule, and accordingly, we decline to address it. See State v. Nadler, 151 N.H. 244, 248 (2004)(court declined to review undeveloped argument).

Second, Blake argues that the PAB has jurisdiction to hear her claim because she alleged that her termination violated New Hampshire Administrative Rules, Per 1002.03 and 1002.08, which govern employment discipline. We disagree. Application of these rules is expressly limited to full-time employees within the state system. See N H Admin Rules, Per 1002.01.

Blake contends, however, that a former version of the administrative rules properly applied the discipline rules to all classified employees, and that the 1998 amendment, which limited the discipline rules to full-time employees, violates the separation of powers doctrine. In particular, she argues that the 1998 amendment conflicts with the legislative directive that the personnel rules for separation and discipline cover all classified state employees. See RSA 21-I:43, II (2000). The question before us in this appeal, however, is limited to whether the PAB correctly determined that Blake's appeal was outside its subject matter jurisdiction. Because Blake relies solely upon the PAB's general authority under RSA 21-I:46, I, to hear and decide "appeals of decisions arising out of application of the rules adopted by the director of personnel," our review is restricted to assessing whether Blake alleged before the PAB that her termination involved a violation or misapplication of a personnel rule. The current discipline rules do not apply to Blake as a part-time employee, and, thus, the PAB correctly concluded that it lacked jurisdiction to consider her appeal. Blake's challenge to whether a particular administrative rule comports with a legislative directive is, therefore, not properly before us in the context of this appeal. The PAB similarly recognized this limitation:

Although the Board agrees that there should be some mechanism for reviewing decisions to dismiss part-time employees where there is evidence of a possible bad-faith termination, the Board does not believe that it can extend its jurisdiction beyond that described in the law and the rules adopted by the .Director of Personnel.

Finally, Frappiea argues that the PAB has jurisdiction to hear her claim because she alleged that her termination violated New Hampshire Administrative Rules, Part Per 1100 (Part 1100), governing layoff procedures. However, her pleadings before the PAB alleged that her termination comprised unlawful retaliation for her union-related activity, which is unrelated to Part 1100. The PAB properly concluded that Frappiea failed to explain in her pleadings how or why her layoff constituted a violation or misapplication of the administrative layoff rules. Therefore, we conclude that the PAB correctly determined that it lacked jurisdiction under RSA 21-I:46 to consider her appeal.

Accordingly, we conclude that the PAB did not err in dismissing the petitioners' appeals.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**

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NH Personnel Appeals Board, #2008-O-002, #2008-T-003

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State of New Hampshire



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Appeal of Darlene Frappiea

Docket #2008-O-002

Department of Employment Security

*Board's Response to Appellant's Motion for Reconsideration,
Department's Objection to Motion for Reconsideration
and Motion to Dismiss Motion for Reconsideration, and
Appellant's Response to Motion to Dismiss Motion for Reconsideration*

April 25, 2008

By letter dated March 28, 2008, SEA Grievance Representative Randy Choiniere filed the Appellant's Motion for Reconsideration of the Board's February 27, 2008 decision in the above-titled appeal. By letter dated April 3, 2008, Attorney Charles H. Bradley, III, filed the Department's Objection to Motion for Reconsideration and Motion to Dismiss Motion for Reconsideration. On April 4, 2008, Mr. Choiniere filed his response to the State's Motion to Dismiss Motion for Reconsideration.

After reviewing all the pleadings, the Board voted unanimously to DENY the State's Motion to Dismiss Motion for Reconsideration. In so doing, the Board found that the SEA's failure to deliver a copy of its Motion for Reconsideration to the State on the same date that said Motion was submitted to the Personnel Appeals Board may well have been attributable to clerical error, and that delivery of that Motion to the State on a date later than the date upon which it was delivered to the Board did not unduly prejudice the State in this particular instance. As such, the Board voted to review the Appellant's Motion to determine whether or not the Appellant had set forth grounds upon which the Board might conclude that its decision was either unlawful or unreasonable.

In accordance with Per 208.03 (b), a motion for reconsideration must, "...set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Having carefully reviewed the Motion and Objection in light of the pleadings filed by the parties, and the Board's February 27, 2008 Decision dismissing Ms. Frappiea's appeal as a matter outside the Board's subject matter jurisdiction, the Board voted unanimously to AFFIRM that decision and DENY the Appellant's Motion for Reconsideration. In so doing, the Board found that the Appellant offered insufficient reason for the Board to conclude that its order was unlawful or unreasonable.

THE PERSONNEL APPEALS BOARD


Patrick Wood, Chairman


Robert Johnson, Commissioner

Joseph Casey, Commissioner

- cc: Karen Hutchins, Director of Personnel
Charles Bradley, III, Counsel, Department of Employment Security
Grievance Representative Randy Choiniere, State Employees Association

State of New Hampshire



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Appeal of Darlene Frappiea

Docket #2008-O-002

Department of Employment Security

February 27, 2009 2008 mms

The New Hampshire Personnel Appeals Board (Wood, Johnson and Casey) met in public session on Wednesday, December 5, 2007, under the authority of RSA 21-1:58, to consider the appeal filed by SEA Grievance Representative Randy Choiniere on behalf of Darlene Frappiea, a former part-time temporary employee of the NH Department of Employment Security. The Board also reviewed the Department of Employment Security's Response to Appeals and Motion to Dismiss, filed on October 9, 2007 by Attorney Charles Bradley, and the Union's October 11, 2007 response.

After reviewing the pleadings, the Board found that the following facts are not in dispute:

1. Ms. Frappiea was employed by the Department of Employment Security as a temporary, part-time Certifying Officer III.
2. Ms. Frappiea was laid off from her temporary part-time position effective August 1, 2007.

In support of his request for a hearing, Mr. Choiniere argued that the rules were improperly applied, citing Per 101, the Purpose and Scope of the Rules and Per 1100, the Layoff rules. Mr. Choiniere did not indicate how or why he considered Ms. Frappiea's layoff a violation or a misapplication of either rule.

In detailing the reasons why the layoff was allegedly inappropriate, Mr. Choiniere argued that the layoff was effected in violation of the Collective Bargaining Agreement and the provisions of RSA

273-A. He also argued that the layoff was unjust under the circumstances, citing RSA 21-I:58, I. Mr. Choiniere claimed that the layoff was the result of anti-union animus and retaliation against a union member in good standing after she sought assistance from a steward, asserting that, "The layoff has had a chilling effect on the workplace and discouraged other employees from engaging in union activity or approaching stewards for assistance."

In his Response and Motion to Dismiss, Attorney Bradley indicated that Ms. Frappiea was a part-time temporary employee whose position was discontinued on August 31, 2007. Attorney Bradley indicated that the Department denied the factual allegations outlined in paragraph 8 of the appeal and disagreed with the conclusions expressed in paragraphs 6 and 7 of the appeal. Attorney Bradley moved for dismissal of the appeal, arguing that as a part-time employee at the time of layoff, the appellant had no right to appeal under New Hampshire statutory law, the Personnel Rules of the State of New Hampshire and/or the Rules of the Personnel Appeals Board. In support of that position, Attorney Bradley cited the NH Supreme Court's decision in the Appeal of Higgins-Brodersen, 133 N.H. 576 (1990).

In his response, Mr. Choiniere argued that NHES failed to state the basis for its objection or indicate which facts the State alleged to be untrue, including the Appellant's assertion that she was a union member in good standing, that she approached her union steward about payment of benefits or that the State reduced the appellant's working hours. Mr. Choiniere also argued that the decision in Higgins-Brodersen "...clearly states that part-time employees have appeal rights under 21-I:46" and that "...appeal rights under RSA 21-I:46 apply to Ms. Frappiea irrespective of her status as either temporary part-time or part-time indefinite."

Having considered the pleadings, including the original appeal, the State's response and motion to dismiss, and the appellant's objection thereto, the Board found the following:

1. RSA 21-I:46 states, in pertinent part, "The personnel appeals board shall hear and decide appeals as provided by RSA 21-I:57 and 21-I:58 and appeals of decisions arising out of application of the rules adopted by the director of personnel..."

2. RSA 21-1:58 provides for appeal by "Any permanent employee who is affected by any application of the personnel rules, except for those rules enumerated in RSA 21-1:46, 1 and the application of rules in classification decisions appealable under RSA 21-1:57..." Ms. Frappiea is not a permanent employee. As such, she has no right of appeal under the provisions of RSA 21-1:58.
3. RSA 21-1:57 provides for appeal by, "The employee or the department head, or both, affected by the allocation of a position in a classification plan..." Ms. Frappiea's layoff is unrelated to the allocation of a position in a classification plan.
4. According to the Court's decision in Higgins-Brodersen,¹, "RSA 21-1:46 grants to the Board general authority to hear and decide appeals arising out of the rules adopted by the director of personnel... The statute makes no distinction as to employment status; thus part-time employees appear subject to this provision."
5. Although the appellant has a right to appeal a decision arising out of an application of the rules adopted by the Director of Personnel, the appellant failed to state which of the personnel rules adopted by the Director of Personnel affecting part-time employees was allegedly violated or improperly applied.
6. According to the pleadings submitted by the appellant, Ms. Frappiea's layoff "was effected in violation of the applicable Collective Bargaining Agreement (CBA)... [and] ...was also made in violation of RSA 273-A."
7. Although the Court's decision in Higgins-Brodersen affirms the right of part-time employees to appeal, it limits the basis for appeal to those matters arising out of an application of rules adopted by the Director of Personnel. Specifically, the Court wrote, "Upon review we conclude that the petitioners' claims are founded upon [a statute] and do not arise out of an application of the personnel rules. We therefore hold that the Board's conclusion, that it lacked jurisdiction to hear their appeal under RSA 21-1:46, was both legal and reasonable..."

Having carefully reviewed the pleadings submitted by the parties, the Board found that Ms. Frappiea's appeal involves an alleged violation of a statute (RSA 273-A) and an alleged violation of the Collective Bargaining Agreement. Accordingly, the Board found that those issues are outside

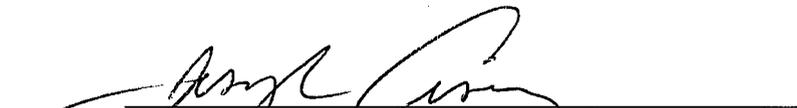
¹ A copy of the decision was available in the Board's records. In the future, if parties cite a law, a rule, a decision or an order in support of a motion to dismiss, that party must attach a copy of same to the motion at the time of filing.

the Board's jurisdiction as defined by RSA 21-l:46. Accordingly, the Board voted unanimously to DISMISS the appeal.

THE PERSONNEL APPEALS BOARD


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